

(H)
No. 86-714

Supreme Court, U.S.
FILED

JUN 4 1987

JOSEPH E. SPANOL, JR.
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1986

RODNEY P. WESTFALL, ET AL., PETITIONERS

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the immunity recognized in *Barr v. Matteo*, 360 U.S. 564 (1959), protects petitioners—federal employees sued in their individual capacities—from liability under state tort law for injuries allegedly caused by their official acts.

II

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Osburn Rutledge and William Bell were defendants in the district court and are petitioners in this Court.

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v.

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***ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT***

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 785 F.2d 1551. The opinion of the district court (Pet. App. 4a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a-9a) was entered on April 8, 1986. A petition for rehearing was denied on June 2, 1986 (Pet. App. 10a-11a). On August 20, 1986, Justice Powell issued an order extending the time for filing a petition for a writ of certiorari to and including September 30, 1986; on September 22, 1986, Justice Powell is-

sued an order further extending the time within which to file a petition to and including October 30, 1986. The petition was filed on that date and was granted on March 2, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. This is a state law tort action in which respondents seek monetary damages from petitioners, all of whom are federal employees, for injuries allegedly caused by conduct that was within the scope of petitioners' official duties.

Respondents William T. Erwin, Sr. and his wife, Emely Erwin, commenced this action in Alabama state court, alleging that William was injured while working as a civilian warehouseman at the Anniston Army Depot when he came into contact with "bags or containers of soda ash [that] were improperly and negligently stored" (Complaint 3). Respondents assert that he "picked up a bag of soda ash and inhaled some of the soda ash dust that had spilled from the bag" (Erwin Affidavit filed June 4, 1985, at 1), that as a result of his contact with the soda ash he sustained chemical burns in his eyes and throat, and that "[s]ince that day * * * the general quality and volume of [his] voice has been greatly diminished" (*ibid.*; Complaint 4). They further assert that the soda ash "should not have been routed to the warehouse where [Erwin] was working," and that "someone should have known that it was there and provided [him] with some warning as to its presence and danger before [he] inhaled it" (Erwin Affidavit 1).¹

¹ The complaint also alleges that the bags containing the soda ash were "negligently designed or manufactured," or,

Petitioners, three federal employees who are supervisors at the Anniston Army Depot, are charged in the complaint with negligence "in proximately causing, permitting, or allowing [William Erwin] to inhale" the soda ash (Complaint 4). Petitioner Rodney P. Westfall is the chief of the Receiving Section at the Depot, Osburn Rutledge is the chief of the Breakdown and Bulk Delivery Unit, and William Bell is the chief of Unloading Unit No. 1 (Fomby Affidavit filed April 4, 1985, at 1). The complaint (at 1-2) also lists as defendants 21 unnamed individuals or entities. William Erwin seeks damages in the amount of \$500,000; Emely Erwin seeks \$25,000 in damages for loss of consortium (Complaint 4, 5).

Petitioners removed the action to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. 1442(a)(1) and filed a motion to dismiss or, in the alternative, for summary judgment on the ground that they were absolutely immune from suit. Respondents opposed the motion, asserting that a federal employee is entitled to immunity from tort liability only if the employee is engaged in policymaking activities.² The district court

alternatively, "that the manufacturers or distributors of such bags issued inadequate warnings concerning their use and storage" (Complaint 3).

² William Erwin filed an affidavit stating that petitioners "are not involved in any policy-making work for the United States Government. Their job duties are similar to mine, with the addition of their supervisory responsibilities. Therefore, [i]t is my understanding that their duties only require them to follow established procedures and guidelines. We all work at the operational level of the United States Government and are not at the policy and planning level" (Erwin Affidavit 2).

granted the motion and dismissed the action against petitioners (Pet. App. 4a-7a). The court first found no dispute regarding petitioners' allegation, made by affidavit, that they were "acting under color of their office and within the scope of their official duties at the time of the acts or omissions made the basis of" respondents' tort claims (*id.* at 5a). Relying upon *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985), the district court stated that "[t]he law of the Eleventh Circuit is clear that * * * any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs," and held that petitioners were "absolutely immune from suit on account of the matters alleged in the complaint" (Pet. App. 5a).

2. The court of appeals reversed (Pet. App. 1a-3a). It observed that "the opinion [in *Johns v. Pettibone Corp.*, *supra*] relied on by the district court was subsequently withdrawn" (*id.* at 2a). The revised opinion "establishes the rule that 'a government employee enjoys immunity only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor's line of duty'" (*id.* at 3a, quoting *Johns v. Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985) (emphasis in original)). Finding that respondents had "alleged undisputed facts sufficient to create a material question of whether or not [petitioners'] complained-of acts were discretionary," the court reversed the grant of summary judgment and remanded the action for further proceedings (Pet. App. 3a).³

³ Although the court of appeals did not define the term "discretion" in its decision in the present case, another panel of the Eleventh Circuit subsequently stated that "'[d]iscretionary acts' involve planning or policy considerations and do

SUMMARY OF ARGUMENT

This action was brought under Alabama state law to recover damages from several federal supervisory employees for personal injuries said to have resulted from the alleged improper delivery and storage of soda ash at an Army civilian warehouse. There is substantial reason to conclude, as have the Fourth and Eighth Circuits, that federal employees are absolutely immune from personal liability under state tort law for acts committed within the scope of their employment. A rule of absolute immunity for actions taken within the scope of employment would eliminate uncertainty as to the scope of immunity protection in state tort law actions, and would most effectively assure that federal functions are performed in a manner free of inhibition and without excessive cost to the government.

This rule is especially important in cases such as this one, where discretionary conduct is at issue. This Court's recent decisions involving the scope of government employees' immunity from constitutional tort actions establish that the protection of the free exercise of discretion is an important factor weighing on the side of conferring immunity protection. Whether or not the Court determines to recognize the broader immunity for all acts within the scope of employment, therefore, it should recognize immunity from liability under state tort law for such acts as involve the exercise of discretion—that is, wherever the law fails to specify the precise action that the official must take in each instance.

Application of immunity to protect federal employees who exercise even minimal discretion in

not concern day to day operations" (*Heathcoat v. Potts*, 790 F.2d 1540, 1542 (1986)).

performing their official duties is fully supported by this Court's decisions, going back almost to the beginning of the Republic. Such protection from suit is necessary to avoid the disruption of federal governmental functions by diverting energy and resources into the litigation process, by inhibiting vigorous performance of duties, and by influencing discretionary decisions in a manner likely to avoid risk of personal liability. Such immunity from state tort law actions also helps to assure that the laws of the separate states will not interfere with the dictates of federal law concerning the performance of federal governmental functions.

The rule adopted by some courts—recognizing immunity from state law tort actions only in instances of “policymaking” discretion—does not provide the protection necessary to ensure the effective functioning of the federal government. Not only does such an approach subject a broad range of discretionary federal decisions to liability under state law; it creates great uncertainty for large categories of employees making plainly discretionary decisions in areas such as personnel management, law enforcement, and benefit program administration.

The limiting of immunity protection to acts of policy level discretion cannot be justified by analogy to the discretionary function exception of the Federal Tort Claims Act (FTCA) (28 U.S.C. 2680(a)). Congress's definition of the scope of that exception was intended to address only the proper limits on governmental liability, and was not informed by the additional concerns, including the impact on the decisionmaking process, that are implicit in suits asserting individual liability. In any event, given the range of governmental activities excepted from the FTCA's waiver of sovereign immunity—by a number of pro-

visions of which the discretionary function exception is just one—a personal immunity for minimally discretionary conduct within the scope of employment is essential to protect Congress's determination that certain federal actions should not be tested in court by reference to state tort law.

The recognition of a broad immunity from state law tort actions leaves in place substantial remedies both to deter improper conduct and, in many instances, to compensate those injured. It applies, of course, only to actions within the outer perimeter of an employee's duties, and thus in no way interferes with suits challenging wholly unauthorized actions of federal employees. Where the immunity is applicable, the government retains a power, which has been regularly exercised, to discipline or discharge employees who act improperly. And in many instances, persons who are denied a right of action against an individual defendant on the basis of immunity retain meaningful avenues of relief under the Federal Employees' Compensation Act or the FTCA.

Recognition of immunity in this situation is also wholly compatible with the immunity doctrine articulated by this Court in constitutional tort cases. The prerequisite to immunity in the latter category of cases—that the defendant not have violated a clearly established constitutional right—is justified by the favored position of federal constitutional rights. There is thus, by definition, no justification for a parallel requirement in a state tort law case. Further, if an additional requirement that there be no violation of clearly established law were imposed, practical problems would render ineffectual the resulting immunity protection. Such an inquiry would

necessarily be concerned not only with state law, but with the interaction of state law principles and the directives of federal law concerning the federal functions being performed. We submit that a conclusion of liability in such a situation will almost never be so clear as to justify denying immunity under such a test. Thus the test, if properly applied, would result in no meaningful limitation on the availability of immunity. Its primary effect would be to generate uncertainty and provide a subject for pointless and harmful litigation.

In sum, federal employees acting within the scope of their employment—and most clearly those exercising a modicum of discretion—are entitled to immunity from state law tort suits. Respondents' tort action was therefore properly dismissed by the district court.

ARGUMENT

PETITIONERS ARE ENTITLED TO IMMUNITY FROM PERSONAL LIABILITY IN THIS STATE TORT DAMAGE ACTION FOR INJURIES CAUSED BY CONDUCT WITHIN THE SCOPE OF PETITIONERS' OFFICIAL DUTIES

This case concerns the extent to which a federal employee is immune from personal liability in damages under state tort law for injuries allegedly caused by the employee's official acts. The scope of the immunity afforded to federal employees is, of course, a matter of federal law, "to be formulated by the courts in the absence of legislative action by Congress" (*Howard v. Lyons*, 360 U.S. 593, 597 (1959)).⁴ And the basic elements of that federal

⁴ As the Court stated in *Howard*, "[t]he authority of a federal officer to act derives from federal sources, and the rule

standard were established by this Court in the landmark decision in *Barr v. Matteo*, 360 U.S. 564 (1959).

In *Barr*, a group of former employees of the federal Office of Rent Stabilization alleged that they had been libeled by a press release issued at the direction of the defendant, who was at the time acting director of the office. Justice Harlan, writing for a plurality of four Justices, stated that the defendant was immune because "[t]he fact that the action [that formed the basis for the libel suit] was within the outer perimeter of [the defendant's] line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint" (360 U.S. at 575). Justice Black concurred on the ground that the tort action challenged the disclosure of information about the functioning of government. "[I]f federal employees are to be subjected to such restraints in reporting their views about how to run the government better," he stated, "the restraint will have to be imposed expressly by Congress and not by the general libel laws of the States or of the District of Columbia" (*id.* at 577 (footnote omitted)). Justice Stewart agreed with the plurality's analysis of the "principles that should guide decision in this troublesome area of law," but dissented from the judgment because he concluded that the issuance of the press release was outside the scope of the defendant's official duties (*id.* at 592). In *Howard v. Lyons, supra*,

which recognizes a privilege * * * is one designed to promote the effective functioning of the Federal Government. No subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States" (360 U.S. at 597).

a majority of the Court—the *Barr* plurality joined by Justice Stewart—adopted the standard announced by the plurality in *Barr*, applying that rule to immunize a federal employee from liability under state libel law for damages allegedly caused by the federal employee's official acts (360 U.S. at 597-598).

In the years since *Barr*, the courts of appeals have considered the scope of federal employees' immunity in the context of a wide variety of tort claims, and have applied the immunity rule announced in *Barr* not only to libel actions, but to all tort claims under state law. *McKinney v. Whitfield*, 736 F.2d 766, 768-769 (D.C. Cir. 1984); *Miller v. DeLaune*, 602 F.2d 198, 200 (9th Cir. 1979) (per curiam); *Norton v. McShane*, 332 F.2d 855, 859-860 & n.5 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 807-808 (1982) (characterizing *Barr* as according "absolute immunity from suits at common law"); *Butz v. Economou*, 438 U.S. 478, 494-495 (1978).

This case brings before the Court a question on which the courts of appeals have not been able to agree—the issue of the types of official actions for which federal employees may receive protection from personal liability under the *Barr* immunity principle. Notwithstanding the *Barr* plurality's statement that immunity from tort liability "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government," and its conclusion that immunity is available to "officers of lower rank in the executive hierarchy,"⁵ the courts of appeals have reached a

⁵ 360 U.S. at 572-573 (footnote omitted); see also *id.* at 587 n.4 (Brennan, J., dissenting) (observing that "[t]he opinion's rationale covers the entire federal bureaucracy").

variety of conclusions regarding the class of federal employees entitled to protection under *Barr*.

Two courts of appeals have held that *Barr* extends immunity to all federal employees, regardless of the nature of their duties or their place in the federal hierarchy. See *General Electric Co. v. United States*, 813 F.2d 1273, 1276-1277 (4th Cir. 1987); *Poolman v. Nelson*, 802 F.2d 304, 307 (8th Cir. 1986). Other courts have restricted immunity to federal employees who exercise discretion, but have reached almost the same result by concluding that the authority to exercise very limited discretion is sufficient to justify immunity.⁶

On the other hand, some courts have taken a restrictive approach, extending protection from liability only to federal employees of a particular rank. The version of this approach applied by the court below in the present case, and by other courts as well, limits the benefit of immunity to federal employees who exercise policymaking authority.⁷ Other courts

⁶ *Granger v. Marek*, 583 F.2d 781 (6th Cir. 1978); *Green v. James*, 473 F.2d 660, 661 (9th Cir. 1973); *Estate of Burks v. Ross*, 438 F.2d 230, 234 (6th Cir. 1971).

⁷ *Heathcoat v. Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986); *Araujo v. Welch*, 742 F.2d 802, 804 (3d Cir. 1984); *Jackson v. Kelly*, 557 F.2d 735, 737-738 (10th Cir. 1977) (en banc). The Eleventh Circuit apparently has decided to reconsider its rule that only policymakers are eligible for immunity. In *Andrews v. Benson*, 809 F.2d 1537 (11th Cir. 1987), the panel applied that rule to hold that the defendants were not entitled to immunity (809 F.2d at 1542). Judge Hill concurred specially, stating that the Eleventh Circuit rule was based on a misreading of *Barr* (809 F.2d at 1544). The full court of appeals granted the defendants' suggestion for rehearing en banc and

have utilized an ad hoc approach in determining "whether judicial scrutiny of a disputed official act might inhibit official policymaking and thus unduly interfere with the efficient operation of government."⁸

There is substantial basis for concluding, as have the Fourth and Eighth Circuits, that federal employees are protected by immunity from suits for damages under state tort law whenever their conduct falls within the scope of their official duties. Protection of federal employees from the risk of personal liability resulting from the performance of their jobs is fundamentally necessary if those jobs are to be performed in a manner free of inhibition and without excessive cost to the government.⁹ Moreover, there is much in the decisions of this Court to suggest that immunity is appropriate in the instance of state tort law actions, without regard to

vacated the panel opinion. See *Andrews v. Benson*, No. 86-7049 (11th Cir. May 11, 1987).

⁸ *Gray v. Bell*, 712 F.2d 490, 505-506 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); see also *Norton v. McShane*, 332 F.2d 855, 859 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965).

⁹ For example, imposing personal liability upon the social security officials whose actions were at issue in *Schweiker v. Hansen*, 450 U.S. 785 (1981), would certainly deter individuals from seeking federal employment and chill incumbent officials from performing their duties. And adopting a uniform standard under which all federal employees would be immune from liability under state law as long as their actions fell within the scope of their duties would not only enable courts to quickly rule on immunity claims, without the need for a burdensome inquiry into the nature of an employee's duties, but would greatly enhance the employee's sense of certainty in the immunity protection afforded to him.

whether the conduct in issue is discretionary or ministerial in nature.¹⁰

In any event, there can be no doubt, following several of this Court's decisions in the context of constitutional tort actions, see, *e.g.*, *Davis v. Scherer*, 468 U.S. 183, 196 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Butz v. Economou*, 438 U.S. 478, 506 (1978), that the presence of discretionary conduct on the part of the federal employee adds an important additional consideration—the protection of the unbiased exercise of that discretion—on the side of recognizing immunity. We submit that this addi-

¹⁰ The Court has explicitly recognized that employees performing ministerial tasks are entitled to immunity in a variety of circumstances. Such immunity clearly applies “as to acts done in connection with a mandatory duty” (*Barr v. Matteo*, 360 U.S. at 575 (plurality opinion); see also page 15, *infra*), or in the implementation of a discretionary determination made by a superior, as long as that determination falls within the scope of his official duties. *Doe v. McMillan*, 412 U.S. 306, 323 (1973); *id.* at 342 (opinion of Rehnquist, J.); cf. *Dalehite v. United States*, 346 U.S. 15, 36 (1953). Of course, these immunity principles are not limited to situations in which the federal employee properly performs his duties. The protection provided to an employee would be quite illusory—it would go no further than the protection always available based on the substantive law—if his eligibility for immunity were to depend upon whether he satisfied a standard of perfection.

Moreover, requiring the federal employee to answer in damages under state law for failing to perform properly a ministerial duty appears indistinguishable in practice from implying a private right of action for the breach of the ministerial duty itself. Accordingly, at least where the standards set forth by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), preclude the recognition of a private action under federal law, a state law damage action might well be inappropriate.

tional consideration is wholly applicable in this case, where a clear form of discretionary conduct is obviously in issue. Whatever the Court might conclude in a case raising the issue of immunity in a wholly ministerial context, therefore, it is quite clear that a federal employee is entitled to immunity whenever the conduct that is the basis for the state tort claim falls within the scope of the employee's official duties and involves the exercise of a minimal quantum of discretion. That quantum of discretion exists whenever the law "fails to specify the precise action that the official must take in each instance" (*Davis v. Scherer*, 468 U.S. at 197 n.14). Petitioners plainly are entitled to immunity under that standard.¹¹

¹¹ If, despite our submission, the Court is not inclined to apply the immunity rule announced in *Barr* to all employees who exercise discretion and act within the outer perimeter of their duties, it should recognize a separate rule of immunity protecting all such federal employees from liability for negligence. An employee whose actions are merely negligent has not, by definition, acted in a manner that is "plainly incompetent" or "knowingly [in] violat[ion] [of] the law" (*Malley v. Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5). Indeed, in describing the scope of qualified immunity in *Butz v. Economou*, *supra*, the Court stated that "[f]ederal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law." 438 U.S. at 507; see also pages 16-18, *infra* (discussing immunity available to federal employees in the absence of proof of malice). An employee therefore should not be subjected to liability in damages for negligently performing his official actions. Because the complaint in this action alleges only negligence (see pages 2-3, *supra*), petitioners are entitled to protection under this more limited immunity standard.

A. This Court's Decisions Indicate That A Federal Employee Need Not Exercise More Than Minimal Discretion In Order To Be Accorded Immunity In An Action Under State Tort Law

Beginning with its earliest cases, this Court recognized that federal employees are in some circumstances entitled to immunity from liability in damages for injuries caused by their official actions. This recognition of immunity has rested on an awareness of the need to protect officials in the exercise of their governmental responsibilities, especially where those responsibilities involve choices between various actions that might be taken. In *Crowell v. McFadon*, 12 U.S. (8 Cranch) 94 (1814), for example, a customs collector detained a vessel pursuant to an embargo statute providing that he could do so "if, in his opinion, it was the intention to violate or evade any of the provisions of the embargo laws, and his conduct was approved and confirmed by the president" (12 U.S. (8 Cranch) at 98). The Court rejected an action for resulting damages, observing that "[t]he law places a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly exercises it, as he must do in the execution of his duty, he cannot be punished for it" (*ibid.*).

It follows that when an official properly performs an act authorized by federal law, he may not be held liable in damages. *Erskine v. Hohnbach*, 81 U.S. (14 Wall.) 613, 616 (1871); *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738, 865-866 (1824); cf. *In re Neagle*, 135 U.S. 1, 75 (1890) (a federal officer who does an act authorized by federal law that was "no more than what was necessary and proper for him to do, * * * cannot be guilty of a

crime under [state] law") (emphasis in original); see generally pages 27-30, *infra*. But this immunity was never limited to situations in which a federal employee properly performed his duties. In a number of early cases, the Court made clear that liability was barred, at least in some instances, even when the official act turned out to be improper.

In *Otis v. Watkins*, 13 U.S. (9 Cranch) 339 (1815), for example, the applicable federal statute authorized detention of a vessel by a customs collector "whenever in [his] opinions the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon" (Act of Apr. 25, 1808, ch. 66, § 11, 2 Stat. 501). In an action in trespass, this Court found error in a jury instruction authorizing liability if the defendant collector acted negligently in detaining the vessel. "[T]he law exposes his conduct to no such scrutiny," the Court stated. "If it did, no public officer would be hardy enough to act under it" (13 U.S. (9 Cranch) at 355-356). The Court found that the collector was entitled to immunity from liability so long as he "honestly entertained the opinion under which he acted" (*id.* at 356), and there was no proof of "malice or other circumstances which may impeach the integrity of the transaction" (*ibid.*).

The Court reached a similar conclusion in *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845), where the Postmaster General was sued for "illegally [and] maliciously" (*id.* at 88) suspending a monetary credit on the books of the Post Office Department to which the plaintiffs were entitled under their contract with the Department. The Court held that the plaintiffs could not recover damages as long as the

Postmaster General had acted in good faith, observing that where the action involved "is not merely a ministerial one," but requires the "exercise [of] judgment and discretion," a public officer is not liable because he "falls into error" (44 U.S. (3 How.) at 98). The Postmaster General "committed an error in supposing that he had a right to set aside allowances for services rendered upon which his predecessor in office had finally decided. But as the case admits that he acted from a sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him." *Id.* at 98-99; see also *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 404 (1851); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 129-132 (1849).

Thus, prior to *Spalding v. Vilas*, 161 U.S. 483 (1896), a government employee could be required to answer in damages for his official actions only where: (1) he acted with malice; (2) "the law require[d] absolutely a ministerial act to be done by [the] public officer, and he neglect[ed] or refuse[d] to do such act" (*Amy v. The Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1870)); or, (3) the employee "acted outside of his federal statutory authority." *Butz v. Economou*, 438 U.S. 478, 490 (1978); see *Bates v. Clark*, 95 U.S. 204, 209 (1877); *Teal v. Felton*, 53 U.S. (12 How.) 284, 291 (1851); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

In *Spalding*, the Court eliminated malice as a condition giving rise to personal liability. The plaintiff there sought money damages from the Postmaster General, alleging that the Postmaster General had issued a circular containing false statements in an effort to injure the plaintiff. This Court found that

the defendant's conduct was within the scope of his official duties and held that he was immune from liability even if he had acted with malice (161 U.S. at 498-499):

In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

The immunity doctrine as applied in *Spalding* was reaffirmed by a plurality of this Court in *Barr v. Matteo, supra*.¹² Concluding that the availability of immunity cannot be and never had been restricted to executive officers of cabinet rank (360 U.S. at 572), the plurality stated that it is "the duties with which the particular officer * * * is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,'—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits" (*id.* at 573-574 (citation omitted)). Thus, although *Barr* itself involved "an official of policy-making rank" (360 U.S. at 575), the plurality in *Barr* did not restrict immunity to federal employees who exercise a particular quantum of discretion.

¹² As we have discussed (see pages 9-10), the plurality's legal analysis was endorsed by Justice Stewart (360 U.S. at 592) and subsequently adopted by a majority of the Court in *Howard v. Lyons, supra*.

See *General Electric Co. v. United States*, 813 F.2d at 1276-1277 & n.3; *Poolman v. Nelson*, 802 F.2d at 307; *Lojuk v. Johnson*, 770 F.2d 619, 626-627 (7th Cir. 1985); *Ricci v. Key Bancshares of Maine, Inc.*, 768 F.2d 456, 463-464 (1st Cir. 1985). "The fact that the action here taken [by the defendant] was within the outer perimeter of [his] line of duty [was] enough to render the privilege applicable" (360 U.S. at 575).¹³

Indeed, the plurality's only discussion of the fact that the defendant in *Barr* did exercise discretion was in connection with its determination that the challenged conduct was within the outer perimeter of his line of duty. The plurality took pains to point out that, because the defendant's responsibilities were discretionary in nature, the absence of specific statutory authority for the challenged conduct did not divest the defendant of the protection of immunity (360 U.S. at 575 (emphasis in original; footnote omitted)) :

That [the defendant] was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory

¹³ Some courts have seized upon the statement in *Barr* that "the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions" (360 U.S. at 573). But the plurality simply was referring to the fact that the greater the official's authority, the "broader the range of [his] responsibilities and duties," and, therefore, the wider the outer perimeter of his line of duty (*ibid.*). The statement in no way indicates that lower level officials are not protected by immunity.

duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.

The Court has not, since *Barr*, squarely considered, the scope of federal employees' immunity from liability in a state law tort action.¹⁴ Accordingly, the

¹⁴ In *Doe v. McMillan*, 412 U.S. 306 (1973), the Court considered whether the Public Printer and the Superintendent of Documents were entitled to immunity in an action in which the plaintiffs sought damages for both constitutional violations and common law torts allegedly committed by those officials in connection with the production and distribution of a congressional committee's report. The Court concluded that the officials did not have "an independent immunity," but instead were immune from damages liability to the extent that employees of the government entity for which they performed printing services would have been entitled to immunity in connection with the production and distribution of the printed material; the officials' immunity in *Doe* therefore turned upon the scope of legislative immunity (412 U.S. at 323).

The Court in *Doe* did discuss *Barr* and at one point stated that "[j]udges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. But policemen and like officials apparently enjoy a more limited privilege" (412 U.S. at 319 (citations omitted)). However, the Court did not indicate whether this statement referred to immunity from constitutional claims or immunity from tort claims; indeed, it supported the reference to a "more limited privilege" by citing *Pierson v. Ray*, 386 U.S. 547 (1967), a case that addressed a police officer's immunity from liability for violations of the Constitution. In view of this ambiguity, and the fact that limiting the scope of immunity under *Barr* was not necessary—or even relevant—to the ground of decision in *Doe*, the Court's brief reference to the scope of immunity cannot be viewed as announcing a restrictive view of the class of federal officials exercising discretionary authority who are entitled to official immunity in the state tort context. See also *Doe*,

rule announced in the Court's early decisions—that all federal employees who exercise discretion are entitled to immunity in connection with acts within the scope of their official duties—remains good law today.

This Court's recent discussion in *Davis v. Scherer*, *supra*, concerning the types of official conduct entitled to immunity in an action alleging constitutional violations, confirms the vitality of that long-standing principle. In *Davis*, a discharged state employee sought damages under 42 U.S.C. 1983, asserting that state officials had violated his right to due process by failing to provide him with either a formal pre-termination hearing or a prompt post-termination hearing, as required by state regulations. The defendants' claim of immunity was opposed on the ground that, by failing to comply with the state regulation setting forth the procedures to be followed in connection with a discharge, the defendants had

412 U.S. at 342 (Rehnquist, J., concurring in part and dissenting in part) (appearing to take a broad view of *Barr* by stating “[t]here is no immunity [under *Barr*] when officials are simply carrying out the directives of officials in the other branches of Government, rather than performing *any discretionary function of their own*”) (emphasis added)). Even if that portion of *Doe* is read as addressing the scope of lower level federal employees' immunity from liability under state law, it indicates only that such employees are entitled to a “more limited privilege,” dependent upon the employee's good faith, not that they should be deprived of all immunity from personal liability. See also page 14 note 11, *supra*.

For the same reasons, the Court's statement in *Harlow v. Fitzgerald*, *supra*, that *Barr* applies to “high” government officials (457 U.S. at 807-808) cannot be read as a limitation upon the scope of the *Barr* rule. *Harlow* concerned official immunity from damages for constitutional violations; any discussion regarding immunity from liability for state law torts is therefore dictum.

breached a "ministerial" duty. According to the plaintiff, the regulation "deprived [the defendants] of all discretion in determining what procedures were to be followed prior to discharge," and the defendants were not entitled to immunity under the standard of *Harlow v. Fitzgerald*, *supra*, which allows immunity for "discretionary, but not ministerial, functions." 468 U.S. at 196 n.14; see *Harlow v. Fitzgerald*, 457 U.S. at 818 (immunity is available to "government officials performing discretionary functions").

This Court rejected that argument and held that the state regulation "left to [the defendants] a substantial measure of discretion" (468 U.S. at 197 n.14). Invoking the definition of discretion adopted in its early cases addressing federal employees' immunity from tort liability, the Court concluded that the defendants' duties were sufficiently discretionary to warrant the protection of official immunity. It stated that "[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused." *Ibid.* (citing *Kendall v. Stokes*, 44 U.S. (3 How.) at 98); see pages 16-17, *supra*; cf. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613-614 (1838) (distinguishing between ministerial and discretionary duties in the mandamus context).¹⁵

The definition of discretion applied by the Court in *Davis* has been applied by the courts of appeals to

¹⁵ The Court rejected the plaintiff's argument for the additional reason that "breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the [plaintiff's] cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties" (468 U.S. at 196-197 n.14).

resolve qualified immunity claims under the *Harlow* standard. See, e.g., *Gagne v. City of Galveston*, 805 F.2d 558, 559-560 (5th Cir. 1986); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1138 n.7 (9th Cir. 1986). It should also be applied to determine whether immunity is warranted in an action for damages under state tort law. There is no reason that these two kinds of immunity should protect different types of conduct or different classes of federal employees, especially in view of the fact that the *Davis* standard is based upon the rule set forth in this Court's decisions in the common law tort context. See *Ricci v. Key Bancshares of Maine, Inc.*, 768 F.2d 456, 464 (1st Cir. 1985) (applying *Davis* test in common law tort action). Moreover, creating categories of conduct that are protected by *Harlow* immunity but subject to tort liability under state law would allow prospective plaintiffs to circumvent the *Harlow* rule by framing their claims in state law rather than constitutional terms.¹⁶

¹⁶ Plaintiffs seeking damages from federal employees frequently allege that the employees' actions violated both the Constitution and state tort law. See, e.g., *Williamson v. United States Dep't of Agriculture*, No. 86-4314 (5th Cir. Apr. 29, 1987), slip op. 3597-3601 (claims arising out of dealings with Farmers Home Administration); *Palermo v. Rorex*, 806 F.2d 1266, 1269-1273 (5th Cir. 1987) (claims against supervisors relating to employee disciplinary action); *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987) (claims based on actions by law enforcement officers), reh'g en banc granted on other grounds, No. 85-6071 (D.C. Cir. May 8, 1987); *Augustine v. McDonald*, 770 F.2d 1442 (9th Cir. 1985) (claims concerning efforts to collect debt owed to the government by the plaintiff); *Wylar v. United States*, 725 F.2d 156 (2d Cir. 1983) (action for damages for entry and search of the plaintiff's apartment by Drug Enforcement Administration agents); *Sprecher v. Graber*, 716

**B. Important Policy Considerations Justify The Rule
Conferring Immunity From State Law Liability Upon
Federal Employees Who Exercise Discretion**

The immunity principle for which we contend is essential to the ability of the federal government to carry out its responsibilities. Immunity is necessary "to aid in the effective functioning of government" (*Barr*, 360 U.S. at 573 (plurality opinion)) by eliminating the intimidation and disruption of federal activities that might result from actual or potential litigation under state tort law.

1. The plurality in *Barr* observed that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits based on acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571; see also *Spalding v. Vilas*, 161 U.S. at 498; *Wilkes v. Dinsman*, 48 U.S. (7 How.) at 129-132; *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950).

The job performance of any federal employee, whether his duties are ministerial or discretionary, undoubtedly would be affected by the prospect of litigation and personal liability for harms allegedly caused by his official acts. As this Court has stated more recently in discussing immunity from liability for constitutional torts, "[the] social costs include the

F.2d 968 (2d Cir. 1983) (claims arising out of investigation by the Securities and Exchange Commission); *Miller v. DeLaune*, *supra* (suit against an Internal Revenue Service agent concerning tax collection efforts).

expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" (*Harlow v. Fitzgerald*, 457 U.S. at 814).

When a federal employee's official duties involve any exercise of discretion, the possibility of personal monetary liability is also likely to influence the manner in which the employee performs his duties, giving him an incentive to shade his decisions and hedge his conduct so as to avoid the sort of confrontation or controversy that might result in a lawsuit. See *Harlow v. Fitzgerald*, 457 U.S. at 814; *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982). As one court stated in upholding a claim of immunity, "[e]xcept for 'the most resolute, or the most irresponsible,' a Government official * * * would indeed find it difficult honestly and independently to [perform his official duties] if he knew that [his conduct] * * * could subject him to the risk, the inconvenience and the embarrassment of a public trial and to possible personal liability, as a result of which he might lose his home, his automobile, his savings and whatever other property, real or personal, he might possess" (*Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, 658 (2d Cir. 1962)).¹⁷

¹⁷ As another court of appeals more recently observed (*Carson v. Block*, 790 F.2d 562, 564 (7th Cir. 1986), cert. denied, No. 86-453 (Dec. 15, 1986)),

[p]rivate firms may buy insurance for their employees, or give them bonuses or shares of the enterprise to induce them to take risks. The United States does not offer [government officials] a "share of the profits" from federal programs * * * and a system under which officials face risks of substantial liability for error without any corresponding prospect of reward for good work is doomed. Only the addled and the foolhardy would dis-

The Court has observed in the context of actions seeking damages for alleged constitutional violations that “[i]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.” *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974); see also *Butz v. Economou*, 438 U.S. at 506-507; *Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *Wood v. Strickland*, 420 U.S. 308, 319, 321 (1975). Because the threat of liability is likely to cause government employees to “exercise their discretion with undue timidity” (*Wood v. Strickland*, 420 U.S. at 321), they are accorded immunity with respect to their discretionary activities. As the plurality recognized in *Barr*, 360 U.S. at 571-572, the same policies justify immunity from liability under state law for federal employees who exercise discretion.¹⁸

regard these incentives, and the addled and foolhardy do not execute statutes very well.

It is also significant that, at least where a private employee acts within the scope of his duties, his employer will almost certainly be liable for the employee’s actions. See, e.g., Restatement (Second) of Torts § 219 (1965). And, as a practical matter, the employer is much more likely to pay any adverse judgment. In the federal employee context, by contrast, sovereign immunity may bar an action against the government, leaving the employee as the only available defendant. See also 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 29.9, at 660-661 (1986).

¹⁸ In the context of actions seeking damages under state tort law, the immunity doctrine also furthers separation of powers principles. This Court has observed that at the time that Congress enacted the Federal Tort Claims Act “[i]t was believed that claims of the kind embraced by the discretionary

2. In *Butz v. Economou*, *supra*, this Court observed that "[t]he immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law." 438 U.S. at 489; see also *Barr v. Matteo*, 360 U.S. at 577 (footnote omitted) (Black, J., concurring) (any restraint on expressions by federal officials "about

function exception would have been exempted from the waiver of sovereign immunity by judicial construction" (*United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984)). That is because "the exemption for discretionary functions * * * was derived from the doctrine of separation of powers, a doctrine to which the courts must adhere even in the absence of an explicit statutory command" (*Canadian Transport Co. v. United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980)). Judicial scrutiny of discretionary Executive Branch determinations would permit "'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," and thereby implicate separation of powers concerns (*Varig Airlines*, 467 U.S. at 814).

In order to avoid the latter result, Congress enacted the discretionary function exception to the Federal Tort Claims Act. It was "'neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like.'" *Varig Airlines*, 467 U.S. 809-810 (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)). Granting immunity to federal employees in connection with their discretionary acts ensures that state law tort actions will not intrude upon separation of powers concerns in a similar manner.

how to run the government better * * * will have to be imposed expressly by Congress and not by the general libel laws of the States or of the District of Columbia"). The rule immunizing federal officers from liability under state law is thus also supported by the well-settled principle that, absent a congressional determination to the contrary, federal activities must be governed by federal standards, not state law.

It has long been clear that "the [C]onstitution and the laws made in pursuance thereof are supreme; * * * they control the [C]onstitution and laws of the respective States, and cannot be controlled by them" (*M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819)). In the absence of affirmative acquiescence by Congress, "the activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943) (footnote omitted); see also *Hancock v. Train*, 426 U.S. 167, 178-179 (1976); *Arizona v. California*, 283 U.S. 423, 451 (1931).

And the states may not accomplish that forbidden end indirectly by regulating the conduct of federal employees. In general, state statutes or regulations may not be invoked to bar or punish the performance of official federal duties. In *In re Neagle*, *supra*, for example, the Court held that a United States marshal could not be prosecuted under state criminal law for a murder committed in the course of performing his official duties. 135 U.S. at 75-76; see also *Johnson v. Maryland*, 254 U.S. 51 (1920); *Ohio v. Thomas*, 173 U.S. 276, 283-284 (1899); *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) at 847-849, 865-

866; cf. *Tennessee v. Davis*, 100 U.S. 257, 263 (1879).¹⁹

Recognition of a generally available damage remedy against federal employees for violations of state tort law standards would shape official conduct to conform to those standards as effectively as a criminal statute. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy"); see also *International Paper Co. v. Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 16 n.19; *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-318

¹⁹ At the same time, this Court has stated that "an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. * * * It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. This might stand on much the same footing as liability under the common law of a State to a person injured by the driver's negligence" (*Johnson v. Maryland*, 254 U.S. at 56 (citations omitted)).

The Court went on to observe, however, that "even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under" federal law (254 U.S. at 56-57). We note further that Congress has acted with respect to the traffic law example referred to in *Johnson*, substituting the United States as the defendant in any case in which a federal employee is sued for injuries arising out of his operation of a motor vehicle when acting within the scope of his official duties. 28 U.S.C. 2679(b) and (c); see also note 29, *infra*.

(1981). The availability of defamation actions, for example, would undoubtedly engender reluctance to come forward with information about malfeasance in office, despite the strong federal interest in exposing such wrongdoing. See *Nietert v. Overby*, No. 84-1049 (10th Cir. Apr. 22, 1987), slip op. 9-13. Federal standards regulating construction or work place safety might well be effectively supplanted if federal employees could be subject to personal liability under a different and more stringent state tort law standard. Immunity from liability under state law for federal employees who exercise discretion prevents this form of state influence over federal activities. See *Butz v. Economou*, 438 U.S. at 489; *Ricci v. Key Bancshares of Maine, Inc.*, 768 F.2d at 463.²⁰

3. Notwithstanding this Court's decision in *Davis v. Scherer*, *supra*, some courts of appeals, including the court below, have insisted that a federal employee is eligible for immunity from a state law tort action only if he exercises discretion relating to "policymaking" rather than to "day to day operations." *Heathcoat v. Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986); see also pages 11-12, *supra*. This more limited immunity does not provide the protec-

²⁰ It is true that the Federal Tort Claims Act adopted state tort law as the standard for imposing monetary liability upon the United States (see 28 U.S.C. 2674). However, the FTCA also contains 13 separate exceptions to the waiver of sovereign immunity (see 28 U.S.C. 2680(a)-(n)), including the exception for claims arising out of the performance of a "discretionary" function or duty by a federal agency or employee (28 U.S.C. 2680(a)). The United States has thus explicitly declined to authorize the application of state tort standards to a wide variety of federal activities. See page 34, *infra*.

tion for federal employees needed to ensure the effective functioning of the federal government.

As a threshold matter, this Court's decision in *Davis* indicates that the need to ensure the effective functioning of government justifies immunity from liability for a constitutional violation as long as a federal employee exercised a minimum degree of discretion. The same policy therefore justifies immunity from liability under state tort law in that situation as well. Indeed, the case for official immunity is, if anything, stronger in the state tort context because there the immunity rule is supported by the policy barring state interference with federal activities. It certainly would be anomalous to subject *federal* employees to greater liability for violations of *state* law than for violations of *federal* constitutional law.²¹

Moreover, a rule restricting immunity to policymakers would render quite uncertain the proper resolution of the immunity claims of major categories of employees whose entitlement to protection cannot reasonably be doubted. Government supervisors

²¹ We recognize that the policies underlying official immunity apply with greatest force when an employee exercises a substantial amount of discretion, because the broader the discretion, the greater the opportunity to alter conduct in response to the threat of suit. Still, the threat of liability will interfere with a federal employee's execution of his duties whenever the employee has a choice in how he should act. The Court's decision in *Davis* adopting a broad definition of the type of discretion sufficient to trigger an entitlement to immunity indicates its agreement with this analysis. Otherwise, the Court would have concluded that a narrower definition of discretion would have been sufficient to ensure the effective functioning of government.

making individual personnel decisions,²² law enforcement officers investigating possible wrongdoing,²³ and federal employees who determine whether an applicant qualifies for benefits under a federal program²⁴ all have regularly received the protection of immunity. That result is appropriate because these employees' duties involve the exercise of discretion, and the prospect of personal liability under state law would hinder the proper performance of those duties. Yet, in most instances, the duties can easily be characterized as either policymaking or operational, depending upon whether one focuses on the range of

²² *Palermo v. Rorex*, *supra*; *Dretar v. Smith*, 752 F.2d 1015, 1017 n.2 (5th Cir. 1985); *Oyler v. National Guard Ass'n*, 743 F.2d 545 (7th Cir. 1984); *McKinney v. Whitfield*, 736 F.2d 766 (D.C. Cir. 1984); *Wallen v. Domm*, 700 F.2d 124 (4th Cir. 1983); *Lawrence v. Acree*, 665 F.2d 1319 (D.C. Cir. 1981); *Mir v. Fosburg*, 646 F.2d 342 (9th Cir. 1980); *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir.), cert. denied, 454 U.S. 940 (1981).

²³ *Wyler v. United States*, *supra*; *Sprecher v. Graber*, *supra*; *George v. Kay*, 632 F.2d 1103 (4th Cir. 1980), cert. denied, 450 U.S. 1029 (1981); *Sami v. United States*, 617 F.2d 755, 771-773 (D.C. Cir. 1979); *Miller v. DeLaune*, *supra*; *Granger v. Marek*, *supra*; *Norton v. McShane*, *supra*.

²⁴ *Williamson v. United States Department of Agriculture*, *supra*; *Poolman v. Nelson*, *supra*; *Johnson v. Busby*, 704 F.2d 419 (8th Cir. 1983); *Owyhee Grazing Ass'n v. Field*, 637 F.2d 694 (9th Cir. 1981). The same result has been reached with regard to other duties performed by federal employees. See *Nietert v. Overby*, *supra* (reporting of fraud, waste and abuse); *Spencer v. New Orleans Levee Board*, 737 F.2d 435 (5th Cir. 1984) (weather forecasting); *Queen v. TVA*, 689 F.2d 80 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983) (evaluation of product effectiveness); *Evans v. Wright*, 582 F.2d 20 (5th Cir. 1978) (monitoring expenditure of federal funds).

choices the employees must make or on the guidelines and standards by which those choices are constrained.²⁵ Drawing such dubious distinctions among various kinds of discretion therefore provides no assistance in identifying the situations in which immunity is appropriate. That approach also fails to recognize that the threat of personal liability will bias *any* discretionary decision in the direction of protecting the official's pocketbook, even though other, less personal, considerations may merit dominant consideration.

Some courts have relied upon the scope of the discretionary function exception contained in the Federal Tort Claims Act (see 28 U.S.C. 2680(a)) in concluding that immunity should be limited to acts of "policy" level discretion. See, *e.g.*, *Jackson v. Kelly*, 557 F.2d 735, 737-738 (10th Cir. 1977) (en banc). As a threshold matter, reliance on the Federal Tort Claims Act to define the limits of personal immunity seems quite unsound. In addressing the appropriate limits upon *governmental* immunity for discretion-

²⁵ In *Chavez v. Singer*, 698 F.2d 420 (10th Cir. 1983), for example, the court found that a fire captain was not entitled to immunity in an action brought by one of his subordinates for injuries he received when he followed the defendant's orders. The court noted that the defendant "had no policy making authority. Although he had operational control at a fire scene, he was required to follow established procedures. At most, his discretion was minimal." 698 F.2d at 422; see also *Franks v. Bolden*, 774 F.2d 1552 (11th Cir. 1985). We find no grounds for distinguishing this sort of supervisory authority from the supervisory authority exercised in the personnel context, as to which the courts agree that federal employees are entitled to immunity. See also *General Electric Co. v. United States*, *supra* (upholding immunity claim in analogous circumstances).

ary acts, Congress had no reason to consider the impact of the threat of personal liability in distorting a decisionmaker's judgment. The effect of the threat of personal liability on individual decisions weighs in favor of according individual employees broader immunity than that available to a governmental entity. *Estate of Burks v. Ross*, 438 F.2d at 234; 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 29.14, at 717, 719-720 (1986); cf. *Owen v. City of Independence*, 445 U.S. 622, 653-656 & n.37 (1980).

In any event, the scope of the government's liability under the Federal Tort Claims Act, taken as a whole, supports a broad definition of discretion in the personal immunity context. In addition to adopting the discretionary function exception, Congress concluded that certain federal activities should be wholly immune from suit under state tort law,²⁶ and that violations of certain tort standards should not give rise to liability on the part of the United States.²⁷ Like the discretionary function exception, these provisions embody a determination that certain government conduct " 'should not be tested through the medium of a damage suit for tort.' " *Varig Airlines*, 467 U.S. at 809-810 (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judi-*

²⁶ See 28 U.S.C. 2680(b) (loss of postal material), 2680(c) (tax and duty assessment or collection; detention of goods by customs or law enforcement officer), 2680(e) (claims arising out of the Trading with the Enemy Act), 2680(f) (government-imposed quarantine), 2680(i) (fiscal operations of the Treasury and regulation of the monetary system), 2680(j) (combatant activities during time of war), 2680(k) (claims arising in foreign country).

²⁷ See 28 U.S.C. 2680(h) (intentional torts).

ciary, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)); see note 18, *supra*.

A plaintiff should not be able to circumvent Congress's determination that the propriety of some federal actions should not be assessed by reference to state tort law by naming a federal employee as the defendant rather than the United States. Cf. *Bush v. Lucas*, 462 U.S. 367, 388 (1983). Because the federal activities covered by the exceptions are so varied, in order that federal employees engaged in those activities may be insulated against liability under state tort law, they must, at a minimum, be protected as to conduct fitting within the broad definition of discretion set forth in *Davis*.²⁸ That approach will protect the class of employees who might otherwise be encouraged to tailor their conduct to the requirements of state law by the threat of personal liability—those employees whose duties are not fully enumerated in explicit federal standards.²⁹

²⁸ Indeed, the areas of governmental activity excepted from coverage under the FTCA no doubt involve many mandatory duties involving no identifiable discretion. See note 26, *supra*. To the extent that is true, the legislative policy of excepting those areas of activity from judicial scrutiny will be furthered most effectively by a rule of absolute immunity for all actions within the scope of employment.

²⁹ Congress has enacted statutes substituting the United States as the defendant in suits against individual federal employees for injuries allegedly resulting from medical malpractice or negligent operation of a motor vehicle, committed in the course of the employee's official duties. See 10 U.S.C. (& Supp. III) 1089 (medical malpractice claims); 28 U.S.C. 2679 (claims asserted against drivers), 38 U.S.C. 4116 (medical malpractice claims); 42 U.S.C. 233 (same). The fact that

4. In defining the scope of government employees' immunity from personal liability for constitutional violations, this Court has recognized that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated" (*Davis v. Scherer*, 468 U.S. at 195).³⁰ Here too, immunity can insulate federal employees from the threat of litigation, and thereby promote "the effective functioning of government" (*Barr*, 360 U.S. at 573), only if employees know in advance that they will not be subject to tort liability for particular official acts. The types of conduct entitled to immunity therefore must be defined with clarity. See *Coleman v. Frantz*, 754 F.2d 719, 727-728 (7th Cir. 1985).

We are unable to formulate a definition of discretion narrower than that adopted by the Court in *Davis* that also provides the certainty necessary if the immunity is to have its intended effect. As we have shown, terms such as "policy" or "judgment" are too imprecise and thus are certain to be applied by courts in ways that will leave an employee wholly

Congress has specifically addressed these two areas of recurrent liability is not dispositive as to the availability of immunity for less common instances of official conduct.

³⁰ Thus, the immunity standard adopted in *Harlow* protects federal employees from personal liability for constitutional violations unless an employee "could be expected to know that certain conduct would violate statutory or constitutional rights." 457 U.S. at 819; see also *Malley v. Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5 ("[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law").

unsure about his entitlement to immunity for a particular action or decision. Cf. *Varig Airlines*, 467 U.S. at 811 (noting difficulty in defining discretion under the Federal Tort Claims Act); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d at 659 (“[t]here is no litmus paper test to distinguish acts of discretion”). This uncertainty itself will tend to defeat the purpose of the immunity and is reason enough to adopt a clearer and broader rule.⁸¹

C. There Is No Persuasive Reason To Limit The Availability Of Official Immunity Where The State Tort Action Challenges Discretionary Conduct Within The Scope Of A Federal Employee's Official Duties

1. Denial of compensation for allegedly meritorious claims is, of course, a feature of every immunity rule. The Court has observed that official immunity requires consideration of the competing policies of “protection of the individual citizen against pecuniary

⁸¹ An additional factor weighing against an immunity test that focuses on the quantum of discretion exercised by the federal employee is that such a standard will more frequently be viewed as justifying substantial discovery. See, e.g., *Heathcoat v. Potts*, 790 F.2d at 1543 (“detailed but abstract” job descriptions found insufficient to determine whether the defendants exercised discretion; court held that it was necessary to obtain a “fuller development of the facts” through discovery). The immunity rule accordingly will not protect officials against the burdens of litigation, a result contrary to the Court’s recognition that an immunity standard should be formulated in a way that will “permit the resolution of many insubstantial claims on summary judgment” so as to avoid “subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery.” *Harlow v. Fitzgerald*, 457 U.S. at 817-818; see also *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original) (official immunity serves as “an immunity from suit rather than a mere defense to liability”).

damage caused by oppressive or malicious action" of government officials, and "protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits." *Barr v. Matteo*, 360 U.S. at 565 (plurality opinion); see also *Harlow v. Fitzgerald*, 457 U.S. at 807. However, the Court has never found the interest in deterring and remedying inappropriate governmental conduct sufficient to override the countervailing policies favoring immunity where immunity is demonstrably necessary to the effective functioning of government. Immunity is similarly appropriate here, in part because the remedial and deterrence interests are furthered in several ways notwithstanding the recognition of immunity.

First, a federal employee is only immune from liability for damage caused by acts that are "within the outer perimeter of [his] line of duty" (*Barr*, 360 U.S. at 575). The inquiry is whether the act has "more or less connection with the general matters committed by law to [the employee's] control or supervision," in which case it falls within the scope of his duties, or whether it is "manifestly or palpably beyond his authority." *Spalding v. Vilas*, 161 U.S. at 498; see also *Butz v. Economou*, 438 U.S. at 495; *Barr*, 360 U.S. at 573-574. The immunity rule thus may not be invoked to bar a tort action seeking damages for wholly unauthorized conduct by government employees. See, e.g., *Wheeldin v. Wheeler*, 373 U.S. 647, 650-651 (1963); *Otto v. Heckler*, 781 F.2d 754, 757-758 (9th Cir. 1986); *Bates v. Clark*, 95 U.S. at 204; *Little v. Barreme*, 6 U.S. (2 Cranch) at 179; see also *Green v. James*, 473 F.2d 660 (9th Cir. 1973).

This limitation upon the scope of an employee's immunity assumes greater significance as the employ-

ee's discretion narrows. Cf. *Scheuer v. Rhodes*, 416 U.S. at 247 (observing that scope of immunity varies, "the variation being dependent upon the scope of discretion and responsibilities of the office[r] and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based"); *Barr*, 360 U.S. at 573 (plurality opinion). Thus, employees who exercise relatively less discretion will be entitled to immunity with respect to a narrower category of conduct.

Second, alternate avenues exist to deter wrongful conduct by federal employees. The government has general authority to take adverse action against an employee in order to "promote the efficiency of the service" (5 U.S.C. 7503(a), 7513(a)), and that authority is routinely invoked to suspend, demote, or discharge federal employees who have acted in a manner injurious to fellow employees or to the public. See, e.g., *Brown v. Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983) (Border Patrol Agent suspended without pay pending trial on criminal charges relating to violations of civil rights); *Doyle v. Veterans Administration*, 667 F.2d 70 (Ct. Cl. 1981) (psychiatrist employed by Veterans Administration dismissed after he was found to have engaged in sexual misconduct with patients); *Johnson v. United States*, 628 F.2d 187 (D.C. Cir. 1980) (law enforcement officer discharged for improper use of his weapon); *Horney v. United States Forest Service*, 29 M.S.P.R. 543 (1985) (employee demoted for negligent testing of ignition device that resulted in fire on private land); *Harris v. United States Dep't of Justice*, 29 M.S.P.R. 332 (1985) (employee suspended for failing to follow accepted nursing practices in administering care to prisoners); *Watkins v. Department of the Navy*, 29 M.S.P.R. 146 (1985) (em-

ployee suspended for exposing himself and co-worker to excessive radiation); *Super v. Department of the Air Force*, 24 M.S.P.R. 221 (1984) (employee demoted for negligent performance of duties that resulted in possibility of serious damage to persons and property).³²

Third, compensation for injuries caused by activities of the federal government is available, in many instances, through avenues other than a state law tort suit against a federal employee in his personal capacity. With respect to injuries incurred by a federal employee in the course of performing his official

³² See also *Lappin v. Department of Justice*, 24 M.S.P.R. 195 (1984) (employee removed from position as deputy United States Marshal because he performed his official duties in a manner that endangered the safety of others); *Poarch v. Department of the Navy*, 22 M.S.P.R. 34 (1984) (employee removed for making threats of bodily harm); *Riley v. Department of Agriculture*, 20 M.S.P.R. 32 (1984) (employee suspended and demoted for setting forest fire); *Randall v. Department of the Navy*, 18 M.S.P.R. 485, 486 (1983) (employee removed for reporting to duty while under the influence of alcohol; Board found that, because of the employee's duties, "his condition, if undetected, would have constituted a danger to himself and other employees"); *Connolly v. Department of Justice*, 18 M.S.P.R. 39 (1983) (employee removed for willfully committing false arrest); *Johnson v. Department of the Air Force*, 11 M.S.P.R. 239 (1982) (employee demoted from supervisory position because his actions did not comply with agency directives and created a danger to property and fellow employees); *Clark v. Department of the Navy*, 6 M.S.P.R. 24 (1981) (employees suspended for use of intoxicants while on duty); *Vick v. Department of the Navy*, 3 M.S.P.R. 364 (1980) (employee discharged for endangering the safety of a ship by improperly performing his duties); *Hardgrave v. Department of Interior*, 1 M.S.P.R. 267 (1979) (employee demoted because his poor driving had resulted in injuries to the public).

duties, Congress has adopted the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101. The FECA, which resembles state worker's compensation statutes, provides for administrative no-fault compensation when a federal employee incurs an injury on the job. The statute authorizes medical benefits, vocational rehabilitation and compensation for permanent disabilities (see 5 U.S.C. 8102-8115). Thus, the Department of the Army informs us that William Erwin was reimbursed under the FECA for his medical costs and received disability pay for the period that he was unable to work. He did not receive compensation for the alleged harm to his vocal chords because the FECA does not authorize compensation for that injury.³³

Further, the Federal Tort Claims Act (FTCA) embodies the government's waiver of sovereign immunity with respect to tort claims generally.³⁴ While, as we have indicated (see pages 34-35, *supra*), the FTCA contains substantial explicit exceptions from

³³ The FECA expressly precludes an employee who receives benefits under the statute from asserting any further claim against the United States (5 U.S.C. 8116). It does not address the right of an employee who receives benefits to assert a tort claim against his fellow employees, and several courts of appeals have concluded that the statute does not preclude such claims. *Heacock v. Potts*, 790 F.2d at 1543; *Bates v. Harp*, 573 F.2d 930, 934-936 (6th Cir. 1978); *Allman v. Hanley*, 302 F.2d 559, 563 (5th Cir. 1962). We do not argue that respondents' claims are precluded by statute. The availability of FECA benefits, however, goes some distance toward defeating any argument that a narrowed concept of immunity is necessary to assure that the injured party's interest in compensation and deterrence is properly served.

³⁴ The Suits in Admiralty Act contains a similar waiver of sovereign immunity with respect to maritime tort claims against the United States (see 46 U.S.C. 742).

its coverage, neither the discretionary function exception nor all of the exceptions taken together are as broad as the immunity properly available to an individual defendant. Where a federal employee's immunity from personal liability extends beyond the FTCA's statutory exceptions, compensation is available through an action against the United States under the Tort Claims Act. See *Sami v. United States*, 617 F.2d 755, 772 (D.C. Cir. 1979).

Fourth, from a practical perspective, it is unlikely that a broad definition of discretion, leading to a broadened application of individual immunity, will appreciably reduce an injured person's ability to obtain compensation. The limited financial resources of many employees who exercise the more modest sort of discretion which *Davis* recognized as a sufficient basis for immunity, suggests that plaintiffs will rarely lose genuine opportunities for compensation. See *Sami v. United States*, 617 F.2d at 772 & n.30.

In sum, as the plurality stated in *Barr*, while "there may be occasional instances of actual injustice which will go unredressed, * * * we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (360 U.S. at 576). The Court therefore should not limit the scope of immunity in order to protect the right to compensation for wrongful government action.

2. Some judges and commentators have intimated that the immunity standard applied by this Court in *Barr* is unsound because it confers an immunity broader than that available to federal employees for

constitutional violations. See, e.g., *Granger v. Marek*, 583 F.2d 781, 786-787 (6th Cir. 1978) (Merritt, J., dissenting); 5 K. Davis, *Administrative Law Treatise* § 27:22, at 116-117 (2d ed. 1984). This criticism appears to rest on the fact that the employee loses his immunity in the constitutional tort context if he is shown to have violated a clearly established constitutional right. We believe that this additional requirement for immunity for constitutional wrongs is explained by two important differences between constitutional violations and infringements of state tort standards. First, especially with respect to the official actions of federal employees, rights guaranteed under the federal Constitution are entitled to greater protection than those arising under state tort law. See *Butz v. Economou*, 438 U.S. at 495. Second, as the Court suggested in *Butz*, where a federal employee fails to comply with a clear constitutional rule, he has also acted in a manner that is outside the scope of his official duties. See note 36, *infra*. Thus, the scope of employment requirement inherent in the *Barr* immunity test is the appropriate analog to *Harlow's* clearly established constitutional right test. There is accordingly no basis for further qualifying the availability of immunity in the state law context.

This conclusion is supported by the unworkability of the supplemental provision that would have to be added to the *Barr* test to parallel the *Harlow* rule that an official is divested of immunity in the constitutional context if he violates a "clearly established statutory or constitutional right[] of which a reasonable person would have known" (457 U.S. at 818). Under *Harlow*, one looks to the clearly established character of the constitutional right that is the subject of the action, so in the state tort context

the inquiry presumably would look to the clarity and established character of the state law right at issue. Given the involvement of a federal employee, however, the inquiry would necessarily be more complex. Regardless of the clarity of a given violation as a matter of state law, a federal employee must view any state law duties through an overlay of federal law obligations. Thus, the employee could be deprived of immunity only where he (1) should have known he was violating a state law duty, and (2) should have known that his affirmative obligations under federal law incorporated that state law rule. See pages 27-30, *supra*.

This inquiry is, at best, an uncertain one. It is no easy matter for judges and lawyers to evaluate the interplay of state tort law and federal law relating to the performance of governmental functions. Because federal law is generally supreme, there is usually no basis for liability in any event. See note 19, *supra*. To the extent that courts find otherwise in specific cases, it will nonetheless be very difficult to conclude that such a result should have been known in advance to a non-lawyer, federal employee. We think that it will almost never be the case that a federal employee performing a discretionary function within the scope of his employment will violate state law duties that he should have known were binding on him in the course of the execution of his official responsibilities.

Moreover, when faced with this issue in divergent fact situations, courts would predictably reach unpredictable results. Insofar as they would find liability they would, in most instances, undercut the purpose of immunity by creating uncertainty for others. Such uncertainty cannot be justified given the very few if any instances where a clear violation of inter-

locking state and federal provisions might properly be found. All things considered, the project is not worth the candle. Finally, such a mixing together of federal and state standards and remedies is inappropriate. By allowing the state tort law action to go forward only where the conduct clearly violates a separate, federal legal standard or a state standard incorporated into federal law, the state tort law remedy essentially becomes a private right of action for violations of federal provisions which themselves embody no action for damages. Remedies for federal law violations are thus implied by a chain of reasoning which bears no resemblance in logic or result to this Court's established approach to the recognition of implied rights of action. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

The Court considered an analogous situation in *Davis v. Scherer*, *supra*. The plaintiff in that case argued that the defendants' failure to comply with a state regulation was sufficient to vitiate their immunity from liability for a constitutional violation. The Court rejected that argument, holding that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision" (468 U.S. at 194). The Court further stated that "officials sued for violations of rights conferred by a statute or regulation * * * do not forfeit their immunity by violating some *other* statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages" (*id.* at 194 n.12 (emphasis in original)).³⁵

³⁵ Another alternative qualified immunity rule is the pre-*Spalding* rule under which a federal employee lost his im-

In sum, we submit that the *Barr* rule, requiring that the employee act within the scope of employment, is the proper analog in the state tort law context to the *Harlow* immunity standard for constitutional torts. There is neither a sound reason to impose any "clearly established law" requirement in the context of an action under state law, nor any practicable way in which to do so.³⁶

munity if the plaintiff could show that the federal employee had acted with malice. See *Barr*, 360 U.S. at 586-588 (Brennan, J., dissenting); see also pages 16-17, *supra*. Such an approach might arguably have been justified at the time of this Court's decision in *Butz v. Economou*, *supra*, under which a federal employee lost his immunity if he was shown to have acted in subjective bad faith—i.e., with malice. And should the Court reject the general thrust of our argument, we believe that immunity from actions alleging mere negligence should be allowed, and could be implemented by imposition of an absence-of-malice requirement. See note 11, *supra*.

In general, however, it appears that the basis for such a requirement was eliminated by this Court's decision in *Harlow v. Fitzgerald*, *supra*, which deleted the subjective portion of the *Butz* immunity standard, stating that "[t]here are special costs to 'subjective' inquiries of this kind. * * * 'Judicial inquiry into subjective motivation * * * may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.'" The Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" (457 U.S. at 816-818 (footnotes omitted)). A state-of-mind-based immunity rule in the state tort law context would raise the very problems that led the *Harlow* Court to reject such a rule, and is thus precluded by that decision.

³⁶ This conclusion is supported by the Court's opinion in *Butz*, which justified adoption of a qualified immunity rule for constitutional violations by observing that "if [federal em-

D. Petitioners Are Immune From Liability Under State Law

In rejecting petitioners' immunity defense, the court of appeals found "a material question" as to whether petitioners' acts were sufficiently discretionary to entitle petitioners to immunity (Pet. App. 3a). Although the court of appeals did not, in this case, discuss at length the content of the discretion requirement, it has subsequently stated that acts involving "planning or policy consideration[s]" are sufficiently discretionary to warrant immunity, while acts involving "day to day operations" are not (*Heathcoat v. Potts*, 790 F.2d at 1542).

The court of appeals thus applied the wrong standard in this case. Moreover, there is no question that petitioners exercised sufficient discretion to trigger immunity under the *Davis* standard. The complaint alleges that the soda ash was improperly stored, that William Erwin should have been warned regarding the presence of the soda ash, and that the soda ash was improperly bagged. These actions typically involve the exercise of discretion. See *Dalehite v. United States*, 346 U.S. 15, 38-44 (1953) (holding that the United States was not subject to tort liability in connection with similar determinations regarding the storage of chemicals because those determinations

ployees] are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability." 438 U.S. at 495; see also *id.* at 493-494. The Court thus suggested that *Barr's* scope of official duty requirement filled the role, in the state tort context, of the rule vitiating immunity from constitutional liability where an employee violates a clearly established constitutional right.

fell within the discretionary function exception to the Tort Claims Act).

Indeed, respondents' factual allegations, upon which the court of appeals relied in finding a disputed question of material fact, were that petitioners "are not involved in any policy-making work for the United States Government," that petitioners' duties required them "to follow established procedures and guidelines," and that petitioners "work at the operational level of the United States Government and are not at the policy and planning level" (Erwin Affidavit 2). Respondents thus implicitly acknowledge that petitioners exercised "operational" discretion with respect to the conduct challenged in the complaint, and contend only that petitioners were not engaged in policymaking. Because petitioners are not charged with exceeding the outer perimeter of their discretionary authority, they are certainly entitled to immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1987